Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 200

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES INC., SAN DIEGO GAS AND ELECTRIC COMPANY, INTERNATIONAL PAPER COMPANY, CHAMPION INTERNATIONAL CORPORATION, WESTVACO CORPORATION, and WEYERHAUSER COMPANY

PETITIONERS

V.

CHEVRON U.S.A. INC.

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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67pgs

QUESTIONS PRESENTED FOR REVIEW

1. Has the practice of issuing unpublished decisions not citable as precedent been so misused here to avoid facing issues of first impression so as to require reversal?

2. Do the varying standards of the Courts of Appeals with regard to the use of unpublished opinions and their citation as precedent or for their persuasive effect require this Court's consideration as to the need for a uniform policy?

3. Has the refusal of the Court of Appeals for the Federal Circuit here to honor the language of prior decisions and its own repeated assurance that a private cause of action exists pursuant to the Economic Stabilization Act ("ESA") to recover for crude oil overcharges so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

4. Was the refusal of the Federal Circuit here to apply a specific federal statute of limitations for public enforcement actions pursuant to ESA Section 209 to private causes of action under ESA Section 210 for the same violations in conflict with the decisions of this Court?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the case contains the names of all of the parties.

International Paper Company, Westvaco Corporation and Weyerhauser Company are all themselves publicly owned corporations and have no parent corporation, nor is there any publicly held corporation which owns 10% or more of their stock.

Consolidated Edison Company of New York Inc. and Orange and Rockland Utilities Inc. are wholly owned subsidiaries of a publicly owned corporation, Consolidated Edison Inc.; San Diego Gas & Electric Company is a wholly owned subsidiary of a publicly held corporation, Sempera Energy; Champion International Corporation is a wholly owned subsidiary of International Paper Company. Long Island Lighting Company is a wholly owned subsidiary of Long Island Power Authority, a corporate municipal instrumentality of the State of New York.

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CITATION OF REPORTS OF OPINIONS

Neither the Decision of the Court of Appeals for the Federal Circuit nor the District Court Opinion is reported officially.

The Court of Appeals Decision is reported unofficially at 2002 U.S. Appeals LEXIS 7072 and at 32 Fed Appx. 588, and the denial of rehearing is unofficially reported at 2002 U.S. Appeals LEXIS 11815.

JURISDICTION

The Judgment sought to be reviewed was entered April 5, 2002.

A timely filed Petition for Rehearing was denied by Order entered May 13, 2002.

Jurisdiction of the Supreme Court is pursuant to 28 U.S.C. Sec. 1254.

STATUTES INVOLVED

The statutes involved, the pertinent text of which is set forth in the appendix are: Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (1971), Sections 209-211 (a) ("ESA"), Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627 (1973), Sec. 5(a)(1) ("EPAA"), Petroleum

Overcharge Distribution and Restitution Act of 1986 ("PODRA"), Pub. L. 99-509, 100 Stat. 1884 (1986) 15 U.S.C. Sec. 4504, Federal Courts Administration Act of 1992, Sec. 102 (a)-(d), 106 Stat. 4506 (1992).

STATEMENT OF THE CASE

Plaintiffs, four electric utility companies ("Utilities") and four paper manufacturers ("Manufacturers") sought in this Complaint recovery for overcharges by defendant, Chevron U.S.A.Inc. ("Chevron"). They sought such on their own behalf and on behalf of similarly situated purchasers of petroleum products during the period of federal regulation of the price of crude oil (August 1973 through January 1981)

Utilities and Manufacturers averred that Chevron as a producer of crude oil had overcharged by recovering for price-controlled "old" oil as if it were price-uncontrolled "new oil," and that the plaintiffs and the class had paid a pro rata share of such overcharges. Relief was sought pursuant to Economic Stabilization Act ("ESA") Section 210 which provides for recovery in a private cause of action.

Jurisdiction of the District Court was pursuant to ESA Section 211 (a).

Judge Richard W. Roberts of the District Court for the District of

Columbia granted a Chevron motion to dismiss on two grounds, that (i) even if overcharged, the plaintiffs have no standing to sue because they had not purchased from Chevron directly, and (ii) the action is barred by the applicable statute of limitations.

An appeal was taken by Utilities and Manufacturers to the Court of Appeals for the Federal Circuit which, after briefing and oral argument, entered per curiam judgment with a single word decision, i.e. "Affirmed." and a legend "NOTE: Pursuant to Fed. Cir. R. 47.6 this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically." A petition for panel rehearing and for rehearing en banc was "Denied."

1. The Principal Elements of the Chevron Overcharge

Chevron's recertification of price controlled "old oil" as price-uncontrolled "new oil" was pursuant to a program authorized by the Department of Energy ("DOE") to encourage tertiary recovery, i.e. infusion in an oil field in order to recover additional oil. The program, known as the Tertiary Incentive Program ("TIP") permitted a producer of crude oil to increase to the world price crude oil which otherwise had a ceiling price. A

producer was permitted to so "recertify" a volume of ceiling price crude oil to the extent necessary to recover (i) 75% of its expenses and anticipated expenses in the TIP program it was implementing, and (ii) the additional federal Windfall Profits Tax and State Severance Taxes which would result from such a recertification and the resulting higher crude oil prices.

As to its January 1981 production, Chevron accordingly raised its prices on otherwise price-controlled oil sold to itself as a refiner in the amount of $205 million, representing such as within the TIP program authorized purposes.

The condition of the permission to increase crude prices was a requirement that to the extent such increase was either not justified initially or became unjustified by virtue of an abandonment of the TIP program before its completion, the amount of the unjustified increase was required to be returned to those who had paid it. In effect, to the extent the increase was unjustified, it was an overcharge, i.e. an unjustified avoidance of the ceiling price.

The Complaint here charges that in a number of important respects, the increase in the price of crude oil either initially was unjustified or became unjustified as a result of a premature abandonment of the

TIP Program and a recovery from the U.S. Treasury of a portion of the Windfall Profits Tax actually paid, and from the States of a portion of the Severance Tax which had been paid and used as a justification for the price increase.

2. The Impact of the Chevron Overcharges on the Plaintiffs and the Class

The increased price of crude oil recertified by a producer in order to implement a TIP Program was charged by it to the refiner purchasing its crude oil. Pursuant to DOE regulations, it was then passed on by the purchasing refiner to all other domestic refiners of crude oil pro rata, i.e. with each domestic refiner reflecting in its crude oil costs a percentage of the increased crude price calculated by a fraction, the numerator of which was the runs to stills of each refiner and the denominator of which was the runs to stills of all domestic refiners in the month involved.

The mechanism by which the cost of each refiner's crude oil was spread pro rata to all domestic refiners was the Entitlements Program promulgated by DOE's predecessor in 1974. (39 Fed. Reg. 42,246, formerly 10 CFR Sec. 211.67).

The Entitlements Program was adopted to equalize the acquisition cost of crude

oil to all refiners; without such equalization, some refiners would have had a lower crude cost by virtue of having a predominant supply of ceiling priced crude oil, while others would have a higher crude cost because of a predominant supply of unregulated imported crude.

In addition to spreading to all refiners the costs of each refiner, and indeed as a result of such spread, the Entitlements Program left all refiners with an approximately equal per gallon cost of crude oil.

Such equalization of the acquisition cost of crude oil had a further critical effect. As the Department of Energy's adjudicative body, the Office of Hearings and Appeals ("OHA") found on two separate occasions after hearing extensive expert testimony, it enabled refiners to pass on to their customers almost 95% of the increased acquisition cost of crude oil, absorbing only slightly more than 5% of the increased cost. (Report to the Court in In re The Department of Energy Stripper Well Exemption Litigation, ("Report in Stripper Well"), 7 Energy Mgmt. (CCH) par. 90,507; 341 Tract Unit of the Citronelle Field, ("341 Citronelle"), 24 DOE (CCH) par. 81,035 (OHA 1994).

As a result of this "pass through", the purchasers of refined oil products,

such as the Utilities and Manufacturers, paid to the refiners from whom they purchased product all increases in the acquisition cost of crude oil by any refiner, including such increases as were permitted by virtue of the adoption by any or all refiners of a TIP Program.

When, as was the case here, it was recognized that the TIP Program participant (i) had not indeed incurred some of the costs on the basis of which it had increased its crude oil prices (such as Windfall Profits Taxes never actually paid because of the Net Income Limitation) or (ii) later recovered some of the costs on the basis of which it had increased its crude oil prices (such as prepaid expenses and inventory and Windfall Profits Taxes and Severance Taxes paid), the increase in prices which the TIP participant had effectuated became to that extent overcharges which had effected all purchasers of refined product from all refiners to the same per gallon extent.

Neither the defendant here, nor the District Court, questioned the accuracy of the above explanation of the impact of overcharges by any producer on purchasers of product from all refiners. Indeed, it is the basis of OHA's unvarying practice in the case of recovery in a public enforcement action pursuant to ESA Section

209 of allocating to all purchasers of refined product recovered overcharges from any crude oil producer, regardless of whether their purchases were from the refiner who paid the overcharge initially or from a refiner who paid a pro rata share of the overcharge by virtue of the Entitlements Program.

Chevron's merit defense is that it never received the benefit of the $205 million recertification because the January 1981 Entitlements List was never implemented because of deregulation, and that accordingly it has no obligation to make restitution to the extent to which the recertification reflected overcharges. Utilities and Manufacturers maintain that (i) domestic refiners including Chevron did indeed recover in January 1981 sales the $205 million increase in price by Chevron, and (iii) Chevron either did receive or specifically waived the only portion of the $205 million to which it would have been entitled had the January Entitlements Program been implemented in the ordinary course, such having occurred in the settlement of In re The Department of Energy Stripper Well Exemption Litigation, ("Stripper Well") 653 F. Supp. 108 (D. Kan. 1986).

Chevron's pro rata share of crude oil refined by all domestic refiners was

8% (Final Settlement Agreement in Stripper Well, 7 Energy Mgmt (CCH) par. 90,509 at 90,680). Accordingly, if, as plaintiffs contend, the $205 million in Chevron's increased price was recovered in January, 1981 by domestic refiners, only 8% of it was recovered by Chevron itself, and 92% by other domestic refiners; Chevron would receive, and in plaintiffs' view did receive, the 92% recovered by other refiners in the implementation of the Entitlements Program (through the Stripper Well Settlement.)

If therefore, as the District Court apparently believed, ESA Section 210 permits only those who purchased directly from Chevron to recover, Chevron would be obligated to make restitution under ESA Sec. 210 only for 8% of its overcharges, rather than the 100% for which it would clearly be obligated to make restitution in a public ESA Sec. 209 action.

3. The Facts With Regard to the Statute of Limitations Issue

The instant Complaint was filed March 25, 1998, less than six years following the first public notice of the facts with regard to the alleged overcharges; that notice occurred as the result of a Federal Register Notice on May 13, 1992 that the DOE had, on March 26, 1992 issued a Proposed Remedial Order ("PRO") initiating

a public enforcement action against Chevron pursuant to ESA Section 209 (57 Fed. Reg. 20475).

(Plaintiffs were, by intervention, parties in the DOE public enforcement action, and filed the instant Complaint only after the DOE abandoned its enforcement action, and after plaintiffs' challenge to that abandonment was dismissed on the basis that the DOE's discretionary decision to drop the Section 209 enforcement action was not appealable by potential beneficiaries of that action. Consolidated Edison Co. of New York v. O'Leary, 131 F. 3d 1475 (Fed. Cir. 1997); had the DOE persisted in that public enforcement action and succeeded, in accordance with the ESA Section 209 mandate that funds recovered in a public enforcement action be used for "restitution", plaintiffs and the class would have recovered the amounts which they seek in the instant private action. In rejecting the plaintiffs' challenge to the abandonment of DOE's public enforcement action, the Federal Circuit pointed out that the Utilities and Manufacturers had available a private cause of action under ESA Section 210.)

Prior to the enactment of the Petroleum Overcharge Distribution and Restitution Act ("PODRA") October 21,

1986, 15 U.S.C.A. Section 4504, there was no limitation period specified in federal law for either Section 209 or Section 210 actions. The Courts imposed no limitation on Sec. 209 actions, and applied "the most closely analogous state statute of limitations," in Section 210 cases. Bond v. Texaco, 647 F. Supp 1135, 1137 (D.D.C. 1986). In doing so, in actions in the District of Columbia, "The District of Columbia recognizes the so-called discovery rule as to the inception of the limitations period, i.e. the cause of action accrues for limitation purposes not when the injury first occurred, but when the plaintiff discovered, or by the exercise of due diligence should have discovered, the facts giving rise to the claim." In Bond v. Texaco, the Court held that the limitations period began, at the earliest, at the time the DOE issued the then-equivalent of a PRO. id

PODRA provided for a six year limitation for public ESA Section 209 actions; it was silent as to Section 210 private actions. 15 U.S.C.A. Section 4504. Were the six year statute of limitations to be here applied to this Section 210 action and the "discovery rule" honored, all elements of the Chevron overcharge would be within the limitation period.

ARGUMENT

Here, a local rule permitting the Court of Appeals to issue unpublished dispositions not citable as precedent was grossly misused to affirm a District Court decision as to matters of first impression without binding the Court of Appeals to the precedential impact of such decisions.

The characterization of such an appellate determination as "not adding significantly to the body of law," the requisite under Federal Circuit Rule 47.6 for a non-precedential decision, is so unjustified as to suggest a denial of the right to appeal.

The misuse here of a rule permitting a non-precedential disposition (i) should be remedied, and (ii) provides a needed opportunity for this Court to review the use of similar rules by the various federal Courts of Appeals.

This Court should preclude such non-precedential disposition rules, inter alia (i) because they eliminate the discipline to decide cases on a consistent basis which is imposed by the precedential implications of Courts of Appeals' dispositions, (ii) because of the variance in the rules of the various Circuits with regard to the persuasive impact of unpublished dispositions , and (iii)

because of the significant variance in the use of such rules by the various Circuits.

I THE PRACTICE OF ISSUING UNPUBLISHED DECISIONS NOT CITABLE AS PRECEDENT HAS BEEN SO MISUSED HERE TO AVOID MAKING A CITABLE DECISION ON MATTERS OF FIRST IMPRESSION AS TO REQUIRE REVERSAL

The District Court here faced, and decided, whether knowingly or not, two issues of first impression in private actions pursuant to ESA Section 210 to recover crude oil overcharges:

(i) whether there is indeed a private cause of a action to recover crude oil overcharges passed through all refiners, or whether the provision for a private cause of action pursuant to ESA Section 210 is ineffective to provide such, and

(ii) whether, in light of the creation in PODRA, 15 U.S.C. Sec. 4504, of a 6 year limitation period for parallel public enforcement actions pursuant to ESA Sec. 209, it is appropriate to adopt the same 6 year limitation period for private actions under ESA Sec. 210.

By affirming the District Court decision, the Court of Appeals has presumably affirmed either or both the District Court holdings, i.e. (i) that the private cause of action supposedly

provided by ESA Section 210 is a toothless tiger because end users of oil products injured by crude oil overcharges passed on to the refiner from whom they purchased product cannot recover from the crude oil producer who overcharged, and (ii) that the private cause of action provided by ESA Section 210 is available only within a state limitation period shorter than that available in the supposedly parallel ESA Section 209 public enforcement action. In the absence of a Court of Appeals opinion, it is not possible to determine whether the Court of Appeals agreed with the District Court as to both holdings, or only as to one, and if only as to one, to which one. It is likely that the Court of Appeals affirmed at least on the first of these two holdings (i) in light of the fact that it was this issue to which the questions on oral argument were directed, and (ii) in light of the fact that elimination of the six year limitation period alone would not have provided a basis for dismissal of the Complaint; at least one of the elements of violation occurred within the three year District of Columbia limitation period.

A. <u>There Can Be No Doubt That Both Issues Were Matters of First Impression.</u>

1. <u>No Court, other than the District Court here, has construed the "overcharge</u>

Court here, has construed the "overcharge the plaintiff" language of ESA Section 210 with regard to crude oil overcharges

The District Court here interpreted the Sec. 210 requirement that a private cause of action is available only "against any person renting property or selling goods or services who is found to have overcharged the plaintiff" as permitting suit only by "direct purchasers of Chevron's crude oil." (Appendix, p. 9a).

If literally applied, such an interpretation would preclude any action to recover crude oil overcharges by private purchasers of refined product to which, as OHA has found, 95% of the increased price of crude oil was passed through, because the direct purchaser of Chevron's crude was Chevron itself. But even if, as the Court would presumably hold, direct purchasers from Chevron as a refiner were permitted to seek recovery for the affect on them of the Chevron crude oil price increases, purchasers of only 8% of the product affected would be entitled to recover, inasmuch as Chevron sold only 8% of the product which had been uniformly affected by the additional charges, with the balance being borne on product sold by other domestic refiners.

Because no Court has ever faced the issue of interpreting the statutory

District Court relied on the interpretation of the language in connection with what are generally referred to as "refined product" cases.

Refined product violations are violations by refiners, resellers or retailers as to refined product. e.g. gasoline, home heating oil, residual fuel oil etc., and affect only the customers of the particular refiner, reseller or retailer. For example, if a refiner sets a price of gasoline in excess of the applicable ceiling price and then sells the gasoline, the only persons possibly affected are the reseller, retailer and end user customers purchasing such. I n contrast, crude oil violations are violations of the regulations by either a producer of crude oil or a reseller of crude oil. Because of the Entitlements Program, regardless of which refiner initially purchases the crude oil, any higher price is borne by all domestic U.S. refiners in proportion to their percentage of national refinery production.

Moreover, because the Entitlements Program leaves all refiners with essentially the same acquisition cost of crude oil, and because the cost of crude oil is the overwhelmingly important component cost of refined product, as OHA has found, the market price of refined oil

products reflected 95% of the essentially uniform crude oil cost to all refiners, so that 95% of the crude oil overcharge was borne by the purchasers of the refined product made with such crude oil.

In the refined product cases, the Courts have interpreted the Sec. 210 language permitting its use only against persons "found to have overcharged the plaintiff" as permitting suit only against the immediate seller and have denied the right of a purchaser to sue a remote seller, albeit recognizing that if there was a cost-plus contract requiring pass-through (Arnson v. General Motors Corporation, 377 F. Supp. 209 (N.D. Ohio 1974)), a situation in which the impact of overcharges on a "remote" purchaser could be determinable in advance (Gulf Oil Corp. v. Dyke, 734 F. 2d 797, 809 (TECA 1984) or the functional equivalent of a cost-plus contract (Eastern Air Lines Inc. v. Atlantic Richfield Co., 609 F. 2d 497, 498 (TECA 1979), pass-through can be recognized.

No court has faced or dealt with an assertion in a Section 210 case involving crude oil overcharges, as here made by plaintiffs, that the Entitlements Program was in fact the "functional equivalent" of a cost-plus contract; it automatically passed on the overcharges by any producer

to all refiners, and by virtue of equalizing the acquisition cost of crude oil to all refiners, assured that any overcharge would (to the extent of some 95%) be passed on to end user purchasers. The Entitlements Program met the requirements for functional equivalence to a cost-plus contract because, (i) unlike the situation in Eastern Air Lines, it was "pre-existing", i.e. it existed before the recertification (rather than requiring approval of an administrative agency, as in Eastern Air Lines), and (ii) unlike the situation in Gulf Oil, the essentially 100% nature of the pass-through was "capable of determination in advance" (rather than requiring a case-by-case determination as to whether the competitive market situation was one in which the overcharged party was able to pass-through, as in Gulf Oil).

2. No Court, other than the District Court here, has examined the issue of whether the adoption in 1986 of a six year statute of limitations for public enforcement actions requires re-examination of the employment of state limitation statutes in parallel private enforcement actions and the adoption of a six year statute.

In the period from the enactment of ESA Sections 209 and 210 in 1971 and until

the enactment of PODRA in 1986, there was no limitation period set forth in the statute either for Section 209 or 210 actions. The Courts treated Sec. 209 actions seeking either "injunctive relief" or "restitution" as equitable actions not subject to any statute of limitations, Citronelle-Mobile Gathering Inc. v. Edwards, 669 F. 2d 717, 721 (TECA 1982), cert. denied 459 U.S. 877 (1982), and "borrowed" state limitation periods as to ESA Section 210 actions seeking to recover the amount of "overcharge", characterizing them as legal in nature. The distinction made sense prior to the termination of price regulation in January, 1981 when the DOE pursuant to Section 209 could either seek to enjoin the alleged illegal pricing or could seek restitution by requiring the violator to adjust its future prices so as to refund the overcharge to its customers. But with the end of regulation, an enforcement action for restitution sought the exact same damages as would be sought in a private Section 210 action; the only difference was that in a Section 209 action, the recovery went initially to the DOE, and then by disbursement to the injured end users, while in a Section 210 action the very same recovery went to the end user plaintiffs directly. The proof of the identity of the two actions here is

demonstrated by the fact that the items of recovery sought by the DOE in its abandoned Section 209 action against Chevron are precisely the same as that sought in the instant Section 210 action.

Congress recognized this conversion of what had been equitable actions under Section 209 into actions for damages by specifying a 6 year limitation period in PODRA (15 U.S.C. Section 4504); its failure to specify the same limitation period for Section 210 actions presumably reflected a view that such actions were unlikely to be brought, both (i) because it had been five years since deregulation, and (ii) because of an assumption that DOE would vigorously prosecute Section 209 actions and that the same recoveries would thereby be available to end users.

The use of state limitations for Section 210 actions was never very satisfactory, as attested to by the struggles which the courts had in determining (i) which States' statute to apply (e.g. Kellermyer v. Blue Flame Gas Corp., 797 F. 2d 983 (TECA 1986), Gulf Oil v. Dyke, supra), (ii) which of the limitation periods of the State to apply (e.g. Sousa v. BP Oil Inc., 1995 WL 842003 (D. Mass. 1995), and (iii) whether, in light of the provision permitting treble damages in Section 210 actions, to apply a

penal or a "compensatory" limitation period, or both (e.g. Sinclair Oil Corp. v. Atlantic Richfield Co., 720 F. Supp. 894, 905-6 (D. Utah 1989), Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F. 2d 984, 991 (TECA 1977).

No Court, to the best of Petitioners' knowledge, has yet considered whether the six year period specified for 209 actions in PODRA, 15 U.S.C.A. Sec. 4504, enacted October 21, 1986, is now properly applied to 210 actions, at least those involving crude oil overcharges where, by virtue of the Entitlements Program, the impact of the alleged overcharges necessarily affect every purchaser in every state.

B. By Barring the Citation of Its Disposition As Precedent, The Federal Circuit Has Either (i) Decided an Issue of First Impression, But Refuses to Take Responsibility for Doing So, Or (ii) Has Decided The Case On Some Basis Other Than The Issues Presented; In Either Case, There Has Been An Effective Denial of The Right to Appeal

If the Federal Circuit did indeed decide one or both of the issues of first impression before the Court, it misused its own rule, and indeed, the purported justification for un-published, non-citable decisions as promulgated by the various Courts of Appeals, i.e. that, as

Federal Circuit Rule 47.6 puts it, the decision is not one "adding significantly to the body of law." (Indeed, in the Court of Appeals for the District of Columbia Circuit, the standards require publication of an opinion in a "case of first impression," the necessary inference being that in such cases there should be a written opinion, D.C. Circuit Rule 36.)

If, on the other hand, the Federal Circuit decided the case on some other basis, e.g. that despite the statutory provision permitting an independent private cause of action, it will not permit such where DOE has determined not to complete a public enforcement action, it has violated the rule of law.

In either event, the Court has avoided the discipline which stems from the precedential effect of a decision.

II THE "CANNOT BE CITED" RULES OF THE CIRCUITS VARY WIDELY, WITH AT LEAST FIVE COURTS PERMITTING THE CITATION OF UNPUBLISHED OPINIONS; MOREOVER, THERE ARE INDICATIONS THAT THE USE OF UNPUBLISHED "NON-CITABLE" OPINIONS VARY WIDELY AS AMONG THE CIRCUITS; THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED TO OBTAIN UNIFORMITY

The rules of the various Circuits

vary widely as to the standards for publication. Thus, for example, the First Circuit explicitly provides a preference for publication, Rule 36, while other Circuits do not, and the D.C. Circuit rules suggest that there be opinions written and published in cases of first impression, Rule 36, while others do not.

Moreover, a recent study comparing the percentage of decisions published in the Eighth and Tenth Circuits during the first six months of the year 2000 shows a 44% publication rate in the Eighth Circuit and a 21% publication rate in the Tenth Circuit. The study suggests clearly different criteria for publication in the two Circuits studied. ("'Unpublished' Opinions as the Bulk of the Iceberg..." Law Library Journal, Vol. 93:4 p. 589 et seq.)

With regard to the citation of unpublished decisions, at least five of the Circuits permit the citation of unpublished decisions, (i) for their "persuasive" effect (Fifth Circuit Rule 47.5.4 and Tenth Circuit Rule 36.3), (ii) because a party believes the unpublished decision has "precedential value" (Sixth Circuit, Rule 28 (g), and Fourth Circuit Rule 36 (c)), and (ii) in the case of the District of Columbia Circuit, after January 1, 2002, unpublished decisions

"may be cited as precedent" (Rule 28).

In contrast, the Federal Circuit has adopted the more restrictive rule, precluding citation of any opinion or order designated not to be cited as precedent. (Federal Circuit Rule 47.6.)

It would seem self-evident that a rule which precludes citation is less likely to insure judicial self-discipline than rules which provide that dispositions can be cited as either precedential or persuasive.

Even if non-publication is justified, it is hard to see any justification for precluding the citing of such decisions, particularly in the current era when "unpublished" opinions are in fact widely and generally available.

In essence, the "non-citation" rule of the Federal Circuit has converted an appeal process into a certiorari process, with the Court not bound by its own determinations. Such significantly impinges on the right to appeal which Congress clearly recognized in providing for appeal to the Federal Circuit as a matter of right, ESA Section 211.

III THE EMASCULATION OF THE PRIVATE CAUSE OF ACTION UNDER ESA SECTION 210 IN CRUDE OIL OVERCHARGE CASES IS (i) INCONSISTENT WITH REFINED PRODUCT DECISIONS OF TECA,

AND (ii) INCONSISTENT WITH THE FEDERAL CIRCUIT AND TECA'S REPEATED ASSURANCE OF THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION

Although the issue of the extent of the availability of ESA Section 210 to recover crude oil overcharges is, as above noted, a matter of first impression, two lines of decisions provide compelling reasons for the reversal of the District Court determination that those injured by crude oil overcharges through the mechanism of the Entitlements Program are without the standing to bring a private cause of action under Section 210.

A. TECA, the Federal Circuit's predecessor (whose decisions it recognizes as precedent) repeatedly recognized in refined product cases that had there been a cost plus contract or its functional equivalent, it would have permitted the offensive or defensive use of "passing-on"

In Gulf Oil Corp. v. Dyke, supra, 734 F. 2d at 809, TECA articulated the principle that the passing on of overcharges is properly recognized where it occurred pursuant to a "pre-existing functional equivalent of a cost-plus contract" (i) pursuant to which the immediate purchaser from the overcharger "would necessarily pass through any overcharge received", and (ii) by virtue

of which "the effect of the overcharge to...(the remote purchaser) must be capable of determination in advance," quoting its prior decision in Eastern Airlines v. Atlantic Richfield Co., 609 F. 2d 497, 498 (TECA 1979). 734 F. 2d at 809.

Plaintiffs here have alleged in their Complaint the facts that establish that the DOE's Entitlement Program was the "functional equivalent of a cost-plus contract", and that the "effect of the overcharge...(on plaintiffs was) capable of determination in advance," thus meeting the requirement as set forth in Gulf Oil Corp. v. Dyke. for an "indirect purchaser" to recover overcharges by a remote producer.

B. The Federal Circuit (and TECA before it) have repeatedly relied on the availability of a private cause of action under ESA Section 210 to recover crude oil overcharges as the basis for denying these same Utilities and Manufacturers the right to challenge the actions of DOE in ESA Section 209 public enforcement proceedings

In Consolidated Edison Co. of New York v. O'Leary, 131 F. 3d 1475 (Fed. Cir. 1997), the Federal Circuit denied an appeal by essentially the same Utilities and Manufacturers from the dismissal by OHA of an ESA Section 209 public enforcement action initiated by the

Secretary of Energy's enforcement arm against Chevron for the same alleged oil overcharges which are the subject of the instant action. In doing so, the Court relied extensively on the availability of the alternative remedy provided by ESA Section 210 pursuant to which the Utilities and Manufacturers could seek the same recoveries directly in a private cause of action. To the same effect, see Consolidated Edison Co. of New York v. O'Leary, 117 F. 3d 538, 544 (Fed. Cir. 1997) ("If plaintiffs have been injured by (crude oil) overcharges, Congress created a generous private remedy for private litigants in Section 210"); Getty Oil Co. v. Department of Energy, 865 F. 2d 270, 275 (TECA 1988) ("Since private would-be intervenors (in a Section 209 proceeding involving crude oil overcharges) are afforded a statutory remedy under Section 210 to recover over-charges, they may not intervene in DOE's enforcement...").

IV DECISIONS OF THIS COURT REQUIRE THE UTILIZATION OF THE LIMITATION PERIOD SPECIFIED FOR ESA SECTION 209 ACTIONS FOR PRIVATE ACTIONS PURSUANT TO ESA SECTION 210 TO RECOVER CRUDE OIL OVERCHARGES

As this Court has noted, although the state-borrowing doctrine may not be

lightly abandoned, the borrowing of a federal statute of limitations may be appropriate "when a rule from elsewhere in federal law provides a closer analogy then available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking". Reed v. United Transportation Union, 488 U.S. 319, 324, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), quoting DelCostello v. Teamsters, 462 U.S. 151, 172, 76 L.Ed. 2d 476, 103 S.Ct. 2281 (1983).

In Lampf v. Gilbertson, 501 U.S. 350, 356-8, 115 L. Ed. 2d 321, 111 S.Ct. 2773 (1991), this Court suggested "a hierarchial inquiry for ascertaining the appropriate limitations period for a federal cause of action where Congress has not set the time within which such an action must be brought."

All three of the determinations outlined by the Court in Lampf here support the selection of the federal six year limitation period:

(i) because of the part contract, part penalty nature of the cause of action, reference to state limitation periods results in uncertainty as to the applicable limitation period, with some courts selecting a contract limitation

period, some a penalty limitation period, and some a "catch-all" limitation period, see e.g. Bond v. Texaco, Inc., supra, 647 F. Supp. at 1138; the result is inconsistency and lack of predictability;

(ii) "the geographic nature of the claim" i.e. that in a crude oil overcharge situation, because of the Entitlements Program, the injury to consumers occurred in all of the States; the result of reference to State limitation periods "would present the danger of forum shopping" as well as the complexity of a State determining whether it should look to a State of violation and if so, to what other State (See also Agency Holding Corp. v. Malley-Duff & Associates Inc., 483 U.S. 143, 154 (1987));

and (iii) "an analogous federal source truly affords a 'closer fit' with the cause of action than does any available state-law source." It is hard to imagine a closer fit than the parallel public enforcement action under ESA Section 209.

In Lampf v. Gilbertson, 501 U.S. 350, 357 (1981), the Court rejected reference to a state statute of limitations for private causes of action brought pursuant to Section 10b of the Securities Exchange Act of 1934 and utilized the federal

limitations period provided for public enforcement actions under that Act, a situation remarkably close to the one presented here.

The Court in Lampf v. Gilbertson identifies the relevant factors in determining whether the federal source affords a "closer fit" as "commonality of purpose and similarity of elements" (501 U.S. at 358). The purpose of Section 209 in the post-regulatory period is the same as of Section 210, i.e. the recovery of overcharges and their restitution to those injured, and the elements of the damage claim are precisely the same. A "closer fit" could hardly be imagined.

CONCLUSION

For the reasons above stated, a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals
For the Federal Circuit

01-1565

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, INC., SAN DIEGO GAS & ELECTRIC COMPANY, INTERNATIONAL PAPER COMPANY, CHAMPION INTERNATIONAL CORPORATION, WESTVACO CORPORATION, and WEYERHAUSER COMPANY,

Plaintiffs-Appellants,

v.

CHEVRON U.S.A., INC.

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In CASE NO(S) 98-CV-764

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam: (MAYER, Chief Judge, RADER and DYK, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: April 5, 2002

_____

Jan Horbaly, Clerk

United States Court of Appeals
For the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 20, 2002.

FOR THE COURT

Jan Horbaly
Clerk

Dated: May 13, 2002 Filed: May, 13, 2002

cc: Philip P. Kalodner
Robert M. Westberg

CONSOLIDATED EDISON V CHEVRON, 01-1565
(DCT – 98-CV-764)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.**
	)	**98-0764 (RWR)**
CHEVRON U.S.A., INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiffs sued Chevron U.S.A., Inc. ("Chevron") under section 210 of the Economic Stabilization Act (ESA"),[1] for damages based on Chevron's alleged

[1] Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (codified at 12 U.S.C. § 1904 note (continued)

overcharges for crude oil. Chevron has moved to dismiss plaintiffs' complaint, asserting that plaintiffs lack standing, that their claim is barred by the applicable statute of limitations, and the plaintiffs' allegations fail to state a claim for relief under section 210. Because plaintiffs lack standing and, alternatively, because plaintiffs' claim is barred by the applicable statute of limitations, the complaint will be dismissed.[2]

(1976)), as incorporated in the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub. L. 93-159, 87 Stat. 627 (codified at 14 U.S.C. §§ 751-760h (1982)). Section 210 of the ESA provides a private right of action to any "person suffering legal wrong because of any act or practice arising out of the [ESA or EPAA] or any order or regulation issued pursuant thereto." See Consolidated Edison v. O'Leary, 131 F. 3d 1475, 1478 (D.C. Cir. 1997).

[2] Having concluded that plaintiffs do not have standing to bring this section 210 claim against Chevron and, alternatively, that the section 210 claim is time-barred, the Court need not address the Rule 12 (b) (6) motion to dismiss for failure to state a claim for relief under section 210.

BACKGROUND

The Economic Regulatory Administration ("ERA"), an office in the Department of Energy ("DOE"), was responsible for enforcing the mandatory price and allocation regulations issued by the DOE under the EPAA and the ESA. The ERA would investigate alleged EPAA violations and issue proposed remedial orders ("PROS") to firms or individuals believed to have engaged in those violations. If the recipient of a PRO contested the allegation of a violation, it could obtain an evidentiary hearing before the Office of Hearings and Appeals ("OHA"), the office with the authority to evaluate PROs and determine whether the remedial order should be issued.

In March 1992, the ERA issued a PRO to Chevron. The PRO, which was published in the Federal Register in May 1992, alleged that during the period of petroleum price controls ending in 1981, Chevron had received excess revenue from the DOE's Tertiary Incentive Program ("TIP") and that Chevron should be required to disgorge the excess revenue.[3] Chevron contested the PRO and, after briefing and

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[3] Under the TIP, "oil producers were eligible for financial benefits if they engaged in tertiary recovery projects, i.e., projects using methods such as thermal, chemical, or miscible gas processes to recover crude oil that could not be (continued)

an evidentiary hearing, the OHA concluded that the PRO issued to Chevron could not be sustained and that no remedial order should be issued to Chevron.[4]

The same companies who are plaintiffs in this case, with the sole exception of Westvaco Corporation ("Westvaco"), challenged the OHA's decision by filing a lawsuit in this district court seeking to compel DOE to issue a remedial order. See Consolidated Edison Company of New York, et al., v. O'Leary, Civil Action No. 96-1149 (TPJ). United States District Judge Thomas Penfield Jackson held that plaintiffs as private parties lacked standing to challenge the results of public enforcement proceedings, and he dismissed that lawsuit. See Memorandum and Order entered January 13, 1997, Exh. 1 to Chevron's Reply ("Jackson Opinion"). Judge Jackson's decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit. See Consolidated Edison v. O'Leary, 131 F. 3d 1475 (D.C. Cir. 1997). Plaintiffs, now joined by Westvaco, then

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recovery techniques." See Consolidated Edison, 131 F. 3d at 1477.

[4] The OHA's decision is not binding in this proceeding. "[A]n enforcment proceeding under section 209 is neither a prerequisite nor a bar to a private action under section 210." See Consolidated Edison, 131 F. 3d at 1478.

(D.C. Cir. 1997). Plaintiffs, now joined by Westvaco, then filed this lawsuit under section 210, and defendant moved to dismiss.

DISCUSSION

I. STANDING

Defendant argues that plaintiffs do not have standing to sue under section 210 because plaintiffs were not direct purchasers of Chevron's crude oil. "Section 210 (b) of the ESA authorizes suits for overcharges ' . . . against any person renting or selling goods or services who is found to have overcharged the plaintiff.'" Gulf Oil Corp. v. Dyke, 734 F.2d 797, 807 (Temp. Emer. Ct. App. 1984). An indirect purchaser has no standing to sue under section 210. Id.; see also Stertz v. Gulf Oil Corp., 685 F.2d, 1367, 1369 n.3 (Temp. Emer. Ct. App. 1981); Bond v. Texaco, Inc., 647 F. Supp. 1135, 1137 (D.D.C. 1986).

Plaintiffs in this case were indirect purchasers. Indeed, plaintiffs admitted as much in their prior lawsuit before Judge Jackson. See Jackson Opinion, at 3 n.2 ("Plaintiffs contend that, as indirect purchasers of Chevron's products, they have no right of action under ESA § 210"). Although it is undisputed that plaintiffs purchased refined product from domestic refiners, plaintiffs now argue that they

Chevron because "every refiner [is] an agent of the overcharging producer." See Plaintiff's Response, at 40. Plaintiffs cite no factual basis or legal authority for their current position, which is clearly inconsistent with the position they took before Judge Jackson. Plaintiffs' argument that they should be deemed direct purchasers with standing under section 210 is without merit.

Plaintiffs also argue that they should be allowed to sue Chevron under section 210 even if they were indirect purchasers. Plaintiffs assert that none of the reported cases holding that only direct purchasers have standing under section 210 involved purchasers or crude oil. Plaintiffs cite no case law which holds that indirect purchasers of crude oil have standing under section 210. Indeed, the Temporary Emergency Court of Appeals note in a case involving crude oil purchases that only direct purchasers have standing to sue under section 210. See Stertz v. Gulf Oil Corp., 783, F.2d 1064, 1066 n.2 (Temp. Emer. Ct. App. 1986).

The law is well-established that, as indirect purchasers, plaintiffs lack standing to sue Chevron under section 210. Plaintiffs' arguments to the contrary are unsupported by legal precedent and are unpersuasive.

II. STATUE OF LIMITATIONS

"Because the ESA [and] EPAA . . . do not contain specific statutes of limitation, [the court] must apply the most

closely analogous state of statute of limitations to causes of action arising under the Acts." Gulf Oil Corp. v. Dyke, 734 F.2d at 807 (citing Ashland Oil Co. of California v. Union Oil Co. of California, 567 F.2d 984 (Temp. Emer. Ct. App. 1977)). The statute of limitations for section 210 lawsuits in the District of Columbia is, at most, three years. See Bond, 647 F. Supp. At 1138 (§ 210 actions most analogous to actions for a statutory penalty or forfeiture, actions on a simple express or implied contract, or actions for which a limitation is not otherwise specially prescribed).

Notwithstanding clear legal authority that the most analogous state statue of limitations governs section 210 cases, plaintiffs argue that the six-year statute of limitations for suits by the DOE under the Petroleum Overcharge Distribution and Restitution Act ("PODRA"), 15 U.S.C. § 4501 *et seq*., should apply. Plaintiffs present no case law or other legal authority to support their argument that the PODRA statute of limitations should apply to a section 210 lawsuit. Instead, plaintiffs argue that no court has decided whether the six-year statue of limitations from PODRA should apply. See Plaintiffs' Response, at 44. Although it may be accurate that no court has specifically addressed whether PODRA's statute of limitations should apply to a section 210 action, federal courts have continued to apply the most analogous state statute of limitations since PODRA was enacted in October 1986. See Ashland Oil Co. v. Cotton Petroleum Corp., 808 F.2d 62, 63 (Temp. Emer. Ct. App.

1986) (decided in December 1986); Stertz v. Gulf Oil Corp., 1988 WL 83188, *2 (E.D.N.Y. 1988).

Additionally, "one of the goals of the national energy policy [is] 'to wind up regulation of the oil industry . . . .'" Kellermyer v. Blue Flame Gas Corp., 797 F.2d 983, 985 (Temp. Emer. Ct. App. 1986) (quoting Johnson Oil Co. v. Dept. of Energy, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982)). Based on the national energy policy, the court in Kellermyer held that a longer statue of limitations "would be much more likely to frustrate the clearly expressed goals of the federal statute than would the more restrictive [statue of limitations]." Kellermyer, 797 F.2d at 986.

Plaintiffs also argue that, even if the three-year statute of limitations applies, they were not aware of the precise breakdown between principal and interest of Chevron's Windfall Profits Tax recoveries until less than three years before they filed this lawsuit. Plaintiffs concede that the PRO included sufficient information regarding the amounts of prepaid expenses and severance tax refunds claimed by plaintiffs in this case as overcharges. The PRO also informed plaintiffs that the ERA proposed over $94 million as an increase in tertiary incentive revenue, a decrease of over $51 million in recoverable allowed expense, and a proposed restitutionary penalty of $125 million.

Plaintiffs received additional information when the OHA published an interlocutory order in August 1993 which detailed an $84 million windfall profit tax credit taken by

Chevron in 1983084. The interlocutory order was published to the public and was not subject to confidentiality or other restrictions.

"The District of Columbia recognizes the so-called 'discovery' rule as to the inception of the limitations period, i.e., the cause of action accrues for limitations purposes not when the injury first occurred, but when the plaintiff discovered, or by the exercise of due diligence should have discovered, the facts giving rise to a claim." Bond, 647 F. Supp. at 1139 (citing Kelton v. District of Columbia, 413 A.2d 919, 921 (D.C. 1980); Dawson v. Eli Lilly & Co., 543 F. Supp. 1330, 1333 (D.D.C. 1982)). As was the case in Bond, plaintiffs in this case had sufficient knowledge of the facts giving rise to their section 210 claim by no later than the publication of the August 1993 interlocutory order. Because plaintiffs did not file this lawsuit until more than three years later, their claim is time-barred and must be dismissed.[5]

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[5] Plaintiffs argue that they could not have filed their lawsuit until they knew the allocation of principal and interest for each element of their overcharge claim because a plaintiff is required to plead a "sum certain" for the alleged overcharge, citing Dempsey v. Rhodes Oil Co., 620 F.2d 274 (Temp. Emer. Ct. App. 1980). Plaintiffs' reliance on Dempsey is misplaced. In Dempsey, the court specifically excepted from (continued)

CONCLUSION

Plaintiffs are indirect purchasers of Chevron's products and, as a result, do not have standing under section 210. Even if plaintiffs had standing under section 210, their claim would be barred by the three-year statute of limitations. Defendant's motion to dismiss will be granted by the accompanying final order.

SIGNED this 5th day of July, 2001.

RICHARD W. ROBERTS
United States District Judge

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the "sum certain" rule the situation in which "the seller has information necessary to a determination of the total overcharge, and this information is not available to the buyer." Id. At 277. To the extent that plaintiffs allege they were unable to obtain certain information regarding elements of the total overcharge, plaintiffs would benefit from the Dempesy exception to the "sum certain" rule and, therefore, would have been able to file their section 210 claim based on the information they had in August 1993.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 98-0764 (RWR)**
CHEVRON U.S.A., INC.,	)	
Defendant.	)	

FINAL ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERD that defendant Chevron U.S.A., Inc.'s Motion to Dismiss [6] be, and hereby is, **GRANTED.**

This is a final appealable order

SIGNED this 5th day of July, 2001.

RICHARD W. ROBERTS
United States District Judge

"Sec. 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"Sec. 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided,* That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund or the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"Sec. 211. Judicial review

"(a) The district courts or the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

Sec. 5(a) (1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated , such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

PETROLEUM OVERCHARGE DISTRIBUTION AND RESTITUTION ACT OF 1986

§ 4504. Statute of limitation

(a) In general

(1) Except as provided in subsection (b) of this section, the commencement of a civil enforcement action shall be barred unless such action is commenced before the later of—

(A) September 30, 1988; or

(B) six years after the date of the violation upon which the action is based.

(2) For purposes of paragraph (1), the term "commencement of a civil enforcement action" means—

(A) the signing and issuance of a proposed remedial order against any person for filing with the Office of Hearings and Appeals of the Department of Energy; or

(B) the filing of a complaint with the appropriate district court of the United States.

(3) For purposes of this section, the term "civil enforcement action" means an administrative or judicial civil action by the Secretary under the Emergency Petroleum Allocation Act of 1973 [15 U.S.C.A. § 751 et seq.] or the Economic Stabilization Act of 1970 (or the regulations issued thereunder) for the enforcement of any violation of such Acts or regulations.

(b) Exceptions

(1) In computing the periods established in subparagraphs (A) and (B) of subsection (a)(1) of this section, there shall be excluded any period—

(A) during which any person who is or may become the subject of a civil enforcement action is outside the United States, has absconded or concealed himself, or is not subject to legal process;

(B) during which facts material to the establishment and maintenance of a civil enforcement action could not be known;

(C) occurring before full compliance with any subpoena or special report order issued to any person under section 772 of this title, and such additional period (not to exceed 12 calendar months) after such compliance for the Secretary to consider the results thereof and commence a civil enforcement action;

(D) during the pendency of any relevant criminal action under the Acts or regulations described in subsection (a)(1) of this section during which a civil enforcement action is held in abeyance as a result of prosecutorial discretion and with or without a stay, and such additional period (not to exceed 12 calendar months) after a final judicial order or dismissal of such criminal action to commence a civil enforcement action;

(E) before the issuance of an order that constitutes final agency action on a request for adjustment from any

rule, regulation, or order under section 7194 of Title 42, and such additional period (not to exceed 12 calendar months) to commence a civil enforcement action; or

(F) of extension, to which the Secretary and the defendant have consent in writing, before the expiration of the time periods prescribed in subsection (a)(1) of this section.

(2) The provisions of subsection (a) of this section shall not affect or apply to any civil enforcement action commenced before, on, or after October 21, 1986, and remanded by the Office of Hearings and Appeals, the Federal Energy Commission, or the court for further action of any kind.

(3) The provisions of subsection (a) of this section shall not apply to any agency orders issued under the Acts or regulations described in subsection (a)(1) of this section or to regulations issued under this chapter, other than a proposed remedial order subject to this section.

(c) Expression of intent

(1) It is the intent of the Congress that—

(A) the Secretary and the Administrator of the Economic Regulatory Administration shall, to the greatest extent possible and within the time frames specified on September 12, 1986, by such Administrator to the Committee on Energy and Commerce of the House of Representatives, commence civil enforcement actions

with respect to all cases known by such Administrator as of October 21, 1986, and designated by such Administrator as "prelitigation cases," unless such an action is found not to be warranted;

(B) the Secretary and such Administrator not delay civil enforcement actions so as to cause the limitation in subsection (a)(1) of this section to apply to any such case;

(C) any negotiations for the purpose of settlement of alleged violations not delay the commencement of a civil enforcement action; and

(D) the Department of Justice cooperate in ensuring that activities necessary, including the enforcement of subpoenas, to commence civil enforcement actions are carried out in a timely manner.

(2) Any failure to comply with the time frames described in paragraph (1)(A) shall not be considered for any purpose in any administrative or judicial proceeding subsequently commenced.

(d) End of investigations and audits

Notwithstanding any other provisions of law, the Secretary shall not initiate, after January 1, 1987, any audit or investigation of alleged civil violations of the Acts or regulations described in subsection (a)(1) of this section for the purpose of commencement of any civil enforcement action. Nothing in this subsection shall affect or apply to any audit or investigation conducted with respect to any civil enforcement action commenced (within the limitation

established by subsection (a)(1) of this section) before, on, or after October 21, 1986. Nothing in this subsection shall limit the authority of the Secretary to continue any audit or investigation initiated before January 1, 1987.

FEDERAL COURTS ADMINISTRATION ACT
OF 1992

Sec. 102. Abolition of Temporary Emergency Court of Appeals

(a) APPEALS UNDER ECONOMIC STABILIZATION ACT—Section 211 of the Economic Stabilization Act of 1970 (Public Law 91-379; 84 Stat. 799) is amended by striking subsections (b) through (h) and inserting the following:

"(b) Appeals from orders or judgments entered by a district court of the United States in cases and controversies arising under this title shall be brought in the United States Court of Appeals for the Federal Circuit if the appeal is from a final decision of the district court or is an interlocutory appeal permitted under section 1292 (c) of title 28, United States Code."

(b) JUDICIAL REVIEW OF EMERGENCY ORDERS UNDER THE NATURAL GAS POLICY ACT—Section 506 (c) of the natural Gas Policy Act of 1978 (15 U.S.C. 3416 (c)) is amended—

(1) in the first sentence, by striking "the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970,. as amended," and inserting "the United States Court of Appeals for the Federal Circuit"; and

(2) by striking "Temporary Emergency Court of Appeals" each place it appears and inserting "United States Court of Appeals for the Federal Circuit."

(c) CONFORMING AMENDMENTS—Section 1295 (a) of title 28, United States Code, is amended—

(1) by striking "and" at the end of paragraph (9);

(2) by striking the period at the end of paragraph (10) and inserting a semicolon; and

(3) by adding at the end of the following new paragraphs:

"(11) of an appeal under section 211 of the Economic Stabilization Act or 1970;

"(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

"(13) of an appeal under section 506 (c) of the Natural Gas Policy Act of 1978; and

"(14) of an appeal under section 523 of the Energy Policy and Conservation Act."

(d) ABOLITION OF COURT—The Temporary Emergency Court of Appeals created by section 211(b) of the Economic Stabilization Act of 1970 is abolished, effective 6 months after the date of the enactment of this Act.